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April 23, 1992

Federal Communications Commission
Office of the Secretary

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BY HAND DELIVERY

Donna R. Searcy,
Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, DC 20554

RE: Motorola Satellite Communications, Inc. Request for
Pioneer's Preference, ET Docket No. 92-28 (PP-32).

Dear Ms. Searcy:

Transmitted for filing in the above referenced-docket, on behalf of Loral Qualcomm Satellite Services, Inc., are an original and four copies of its "Opposition to Request for Confidential Treatment."

Should there be any questions regarding this matter, please contact this office.

Very truly yours,



William D. Wallace
(Member of Florida Bar only)

Attachments

No. of Copies rec'd 0+9
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APR 23 1992

Before the
Federal Communications Commission
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of:)
Request of) ET Docket No. 92-28
MOTOROLA SATELLITE)
COMMUNICATIONS, INC.) File No. PP-32
For a Pioneer's Preference)
_____))
To: The Commission

OPPOSITION TO REQUEST FOR CONFIDENTIAL TREATMENT

On April 10, 1992, Motorola Satellite Communications, Inc. ("Motorola") filed certain materials in connection with a supplement to its prior request for a pioneer's preference in the above-referenced proceeding, and sought confidential treatment under Sections 0.457(d) and 0.459 of the Commission's Rules for this material. See Letter of Philip L. Malet, Esq. to Donna R. Searcy (dated April 10, 1992) ("Motorola Letter"). For the reasons outlined below, Loral Qualcomm Satellite Services, Inc. ("LQSS"), by its attorneys, opposes Motorola's request.

I. LQSS HAS A SUBSTANTIAL INTEREST IN REVIEWING THE MATERIALS SUBMITTED BY MOTOROLA FOR CONFIDENTIAL TREATMENT.

Two days after the date set by the Commission for filing comments on Motorola's request for a pioneer's preference,^{1/}

^{1/} See Public Notice, Mimeo No. 22153 (released March 9, 1992) ("Comments must be submitted by April 8, 1992") (emphasis added).

Motorola filed under seal information "in support of" Motorola's pending pioneer's preference request. Motorola Letter, at 1.

Both Motorola and LQSS have pending before the Commission applications to construct low-earth orbit satellite communications systems which would use the frequencies allocated for RDSS service. See Application of LQSS for GLOBALSTAR (filed June 3, 1991); Application of Motorola for IRIDIUM (filed December 3, 1990). Motorola (PP-32) and LQSS (PP-31) have also submitted requests for pioneer's preferences in connection with their RDSS applications, both of which are pending in ET Docket No. 92-28.

On April 8, 1992, LQSS filed an opposition to Motorola's pioneer's preference request. LQSS argued, inter alia, that Motorola should not be awarded a pioneer's preference because the technology employed in its Iridium application was not innovative, and therefore did not comply with the Commission's criteria for awarding the preference. See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3492, ¶ 37 (1991) ("Report and Order").

Motorola did not serve the late-filed material, and requested that it be withheld from the public and "not placed in the record of the above-referenced proceedings." Id. Thus, Motorola asks that LQSS, which has opposed Motorola's preference request and raised technical arguments on the merits of that request be denied access to this material, denied the ability to comment on the material, and denied an opportunity to rebut Motorola's claim that the submitted material supports Motorola's request.

II. MOTOROLA'S SUPPLEMENTAL MATERIAL MUST BE REJECTED AND/OR DISCLOSED TO THE OTHER LEO/RDSS APPLICANTS.

The Commission must reject Motorola's "confidential" material. Motorola's request for "confidential" treatment is flatly contrary to and impermissible under basic principles of administrative law, and it cannot and should not be granted. It is a bald attempt to influence ex parte the decisionmakers in this proceeding. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir.) (precluding ex parte contact protects "fundamental notions of fairness implicit in due process and . . . the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law"), cert. denied, 434 U.S. 929 (1977).

On the one hand, Motorola requests that the information submitted April 10 not be made available to the public, while, on the other, it requests that the Commission use the material to make a decision on its request for a pioneer's preference. It is well-settled that agency rules may not be promulgated on the basis of information known only to the agency.^{2/} See National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986).

Rather, the information on which agency action is based must be

^{2/} The Commission has indicated that it considers the award of a pioneer's preference as part of the rulemaking procedure in the allocation of frequencies for a service. See Report and Order, 6 FCC Rcd at 3492, ¶ 33.

The Commission has also stated that the award of a pioneer's preference is adjudicative for the purpose of its ex parte rules. Id. at 3493, ¶ 42. As the Commission itself has recognized, the mere filing of ex parte material, such as that filed by Motorola, is improper where, as here, formal oppositions have been filed. See id.; 47 C.F.R. § 1.1208(a) (1991).

placed in the public record, and interested parties must be provided the opportunity for comment. See id.; Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 634 (D.C. Cir. 1978).

Accordingly, if, as Motorola requests, the Commission uses Motorola's "confidential" information in making a decision on its pioneer's preference request, then the information must be placed in the record of this proceeding and made available for comment by interested parties.^{3/} In that event, Motorola's request for confidential treatment must be rejected.

If on the other hand, the Commission decides confidential treatment is warranted for this material,^{4/} then the information cannot be considered "in support of" Motorola's request for a pioneer's preference because granting Motorola's request would preclude submission of relevant information and comment by LQSS (and others that opposed the Motorola preference request). In this case, any Commission decision, which would have to be presumed to have been made on the basis of Motorola's material, or actually made based on it, would be "arbitrary and capricious" for not having taken into account all relevant information, that is, the analysis of interested entities. See National Black Media Coalition, 791 F.2d at 1023-24. Accordingly, if confidential

^{3/} Because the information has not been made available within a reasonable time to allow comment by April 23, 1992, the date set by the Commission for reply comments on the LEO/RDSS applicants' requests for pioneer's preferences, a supplemental comment period must be scheduled in the event the Commission decides to consider Motorola's material and thus makes it available for comment.

^{4/} But see Section III infra.

treatment is accorded Motorola's April 10 filing, the material in that filing cannot be considered "in support of" Motorola's pioneer's preference request.

Motorola's April 10 request for confidentiality is a further demonstration of its belief, demonstrated throughout the LEO/RDSS proceedings, that the Commission's Rules do not apply to Motorola. For example, contrary to the Commission's policies on open entry for use of the RDSS spectrum (see Radiodetermination Satellite Service, 60 RR 2d 298, 305-06 (1986)) Motorola claims it should be granted a monopoly in the spectrum it requests for its Iridium system. See Motorola Reply Comments, at 4-12 (filed January 31, 1992). Moreover, contrary to the Commission's Rules on spectrum-sharing in the RDSS bands (47 C.F.R. § 25.141(e) (1991)), Motorola claims that the Commission should reject the use of CDMA which allows sharing of these frequencies in favor of band segmentation, which reduces the capacity and reliability of all systems which may be authorized to use the RDSS frequencies. See LOSS Consolidated Reply Comments, at 10-15 (filed March 27, 1992).

Now, contrary to basic principles of procedure which govern this proceeding, Motorola requests that the Commission make decisions based upon material not in the record and not available to other entities. Motorola's blatant attempt to circumvent the Commission's procedures must therefore be rejected, and its request for confidential treatment denied.^{5/}

^{5/} Furthermore, to protect against impermissible use of Motorola's material, whether or not it rejects Motorola's material, the Commission should disclose any written communications between or among members of the Commission and its staff relating to Motorola's "confidential" material.

III. MOTOROLA'S APRIL 10 SUPPLEMENTAL MATERIALS DO NOT WARRANT
CONFIDENTIAL TREATMENT.

Motorola has requested that the Commission give confidential treatment to "information concerning pending patent applications, preliminary results of experiments and field tests, a videotape of a voice simulation using the IRIDIUM system, and a computer diskette containing copyrighted software which simulates operation of intersatellite links." Motorola Letter, at 1. This request is based on the claim that the material "constitutes trade secrets and commercial, financial or technical data which must be guarded from Motorola's competitors," and that the material "would be privileged, as a matter of law, as intellectual property and trade secrets if retained by Motorola." Id. This claim for confidentiality should be rejected for the reasons outlined below.

In order for the Commission to grant a request for confidential treatment under Section 0.457(d), the submitter must demonstrate actual competition and a likelihood of substantial competitive harm resulting from disclosure. See New York Telephone Co., 67 RR 2d 567, 567-68 (1990); MTS & WTS Market Structure, 66 RR 2d 1668, 1670 (1989). An unsupported claim of the need for confidentiality does not suffice. See New York Telephone Co., 67 RR 2d at 568; 47 C.F.R. § 0.459(c).

In its April 10 letter request, Motorola makes no showing of how disclosure of the submitted material would cause it competitive harm. It does not even claim that such harm would occur, only that the material should be protected. This request is inadequate to support a claim for confidential treatment.

Furthermore, it does not appear that the material submitted requires confidential treatment in this proceeding. First, with respect to the computer diskette, Motorola acknowledges on the face of its request that the software is copyrighted. Motorola already has the ability, through copyright laws, to prevent competitive use of that software. Accordingly, the material is apparently protected from the harm for which Motorola seeks nondisclosure.

Second, the pending patent applications are not relevant to this proceeding. Motorola has submitted this information "in support of" its request for a pioneer's preference. To receive a pioneer's preference, an applicant must propose a new radio service or an improvement to an existing service through new technology. Report and Order, 6 FCC Rcd at 3492, ¶ 37.

A "pending" patent application does not establish any "new technology"; rather, it simply shows that an applicant claims that certain technology is new.^{6/} Therefore, the pending patent applications submitted by Motorola are irrelevant to the purpose for which it seeks their consideration. Accordingly, they should be returned to Motorola.

^{6/} As Motorola appears to recognize, once a patent is granted, confidential treatment is not required. See Motorola's Attachments to Supplement to Request for Pioneer's Preference, at Att. C & D (filed April 10, 1992) (U.S. Patent Documents). The probative value of granted patents in the pioneer's preference context is as yet unresolved. Cf. GTE's Comments in Opposition to CELSAT's Pioneer's Preference Request, at 4 n.7 (filed April 8, 1992) ("One measure of innovation is the amount of intellectual property involved from the Applicant").

Third, the videotape of a "voice simulation" apparently in some way based on Motorola's system appears to be designed solely for public relations. Such material has no probative value nor any bearing on the technical feasibility of the proposed system. Submission of such material for confidential treatment should be rejected.

Fourth, under the Commission's procedures for awarding a pioneer's preference, the applicant must establish, through experimentation or other means, that the proposal is technically feasible. Report and Order, 6 FCC Rcd at 3493, ¶ 39. Presumably, Motorola submitted the preliminary results of its experiments and field tests to establish the feasibility of its system. However, as discussed above, the Commission cannot consider this material in support of Motorola's request unless the material is placed in the record of the proceeding.

Furthermore, the "results" of tests without more would not appear to provide information which could be appropriated by competitors and used to harm Motorola's competitive position. Confidential treatment for "results" does not appear warranted.

While LQSS has obviously not had the opportunity to review the material submitted under seal by Motorola, the request and description of this material suggests that none of it should be accorded confidential treatment for the purpose Motorola outlines. Accordingly, Motorola's request for confidential treatment should be denied.

IV. INTERESTED PARTIES SHOULD BE ALLOWED TO REVIEW MOTOROLA'S "CONFIDENTIAL" MATERIAL FOR THE PURPOSE OF COMMENTING ON ITS REQUEST FOR A PIONEER'S PREFERENCE.

The Commission has long recognized that where an applicant places confidential information at issue in a contested proceeding, the opponents of the application under consideration have a right to review the confidential material for the purpose of submitting comments in the proceeding. See, e.g., MTS & WTS Market Structure, 66 RR 2d 1668, 1671 n.14 (1989) (Commission would disclose material submitted as confidential where it "is relevant to an important issue in this proceeding"); see also National Rural Telephone Cooperative, 67 RR 2d 462, 465 (1990); Knoxville Broadcasting Corp., 50 RR 2d 531 (1981).

The public interest favors disclosure where the information is relevant to a significant and material fact question. See Knoxville Broadcasting Corp., 50 RR 2d at 533. Disclosure is then necessary "to assure a fair adjudication . . . and a just resolution of the public interest question." Id.

In this case, if as Motorola requests, the Commission considers the "confidential" material "in support of" Motorola's pioneer's preference request, then disclosure would be required, as outlined above, to achieve a fair adjudication of that request and to resolve the public interest question.

Accordingly, in the event that the Commission finds that Motorola's April 10 material should be deemed "confidential," then LQSS requests that the Commission fashion a means by which

interested parties can review the material and provide comments on it in relation to Motorola's request for a pioneer's preference.^{7/}

V. CONCLUSION.

For the reasons outlined above, LQSS requests that Motorola's request for confidential treatment of certain material submitted on April 10 be denied in toto. If, however, the Commission determines to accord Motorola confidential treatment, LQSS asks that the Motorola request be granted only to a limited extent, so that LQSS, and other interested parties, may review the information submitted by Motorola.

Respectfully submitted,

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Dated: April 23, 1992

^{7/} See, e.g., Alaskans for Better Media, 46 RR 2d 991, 995 (1979) (permitting "limited use" of protected material to extent needed for "adequate participation" in proceeding).

CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 23rd day of April, 1992, caused copies of the foregoing "Opposition To Request For Confidential Treatment" to be served by hand delivery (as indicated with *) or by U.S. mail, postage prepaid, to the following:

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